

“Freedom to Serve” Is Not A Lawyer’s Quibble

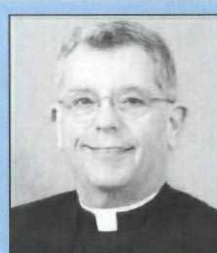
BY FR. MICHAEL D. PLACE, STD

As perhaps you know, one of CHA’s primary areas of engagement in the last few years has been how we can, as a ministry engaged, best respond to the coordinated efforts of various groups to limit or restrict the ability of Catholic health care to operate in a manner consistent with its values and beliefs. Recently, those efforts have been gathered together in a focus area under the title “Freedom to Serve” (www.chausa.org/fsi).

Early on in our analysis of the situation, it became clear that we needed to develop a position paper or case statement that could serve as a positive articulation of the legitimate and critical role of Catholic health care within the philosophical, constitutional, and legal context that is the milieu of the United States. The process of developing the case statement included dialogue with and among some of the most astute Catholic thinkers. And even after a draft was completed, the conversation has continued. One conclusion drawn from this intense reflection and analysis was that our opponents were seeking to reverse long-standing legal and social conventions. In other words, one could argue that our position had the credibility of being the accepted perspective: namely, that the religiously motivated provision of social good and services was one that we should presumptively be able to pursue in a manner consistent with our values and beliefs as religious providers.

This clarification, while providing intellectual consolation, clearly has not been adequate to the task of turning back our challengers. Our opponents have continued to achieve some notable successes, and, if anything, the intensity of the challenges has increased. Our perplexity as to why we have not been more successful is increased when we seek to quantify the potential net gain for our opponents’ cause if current protections were eliminated. Again, cold logic could reasonably question why they expend so much effort for a relatively small increase in the availability of currently prescribed services.

Such wonderment could easily lead to the snap



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conclusion that what we really are dealing with is the recurrence of virulent anti-Catholicism, a bias that, unfortunately, has been part and parcel of the American landscape for centuries. Although I would not summarily exclude such a possibility, I am convinced that it is not a completely sufficient explanation.

For the sake of our collective reflections, I will offer a hypothesis as to what really is at stake and then outline an analytical framework to support the hypothesis. Why engage in such an abstract, if not obtuse, exercise? My answer, quite simply, is that if we do not fully appreciate what is at stake, we unwittingly might fail to pursue the most effective strategic or tactical response.

HYPOTHESIS

Our opponents’ ultimate goal is much more than their so-called reproductive freedoms. Rather, their goal is to neutralize or eliminate the role of organized religion as an actor in the public square, an actor capable of participating in and influencing society’s understanding of what should be our nation’s “public morality”—a public morality that, in turn, can be the occasion for the development of both public policy and civil law.

One could further hypothesize that ultimately they would like to eliminate any sense of there being an objective (transcendental) referent to which public morality is in some manner accountable. On the contrary, public morality would be replaced by a public order that is the result of a social contract entered into by society: a contract that can be changed by majority vote and that, at all times, must honor the primacy of individual rights.

ANALYTICAL FRAMEWORK

For this hypothesis to be appreciated, I must first articulate several premises. In outlining them, I must admit that I am borrowing from—and adapting almost beyond recognition—thoughts liberally borrowed from Fr. John Courtney Murray, SJ; Joseph Cardinal Bernardin; and Fr. Bryan Hehir.

1. The United States has charted a distinctive path with regard to the relationship of the state (that is, government) and organized religion. On one hand, there is no established or state religion. On the other hand, there is a legitimate sphere of freedom of religion for each citizen and every faith. As Cardinal Bernardin noted, our religious pluralism "did not purchase tolerance at the price of expelling religious and moral values from the public life of the nation. The goal of the American system is to provide space for a religious substance in society but not a religious State."¹

2. There is a difference between society or a common social order and the state. In both the American experience and recent Catholic social thought, the role of the state is a limited one that is situated in the context of and aimed toward the realization of society's common good, as well as the common good of the entire human family.

3. One of the tools available to the state in achieving its ends, and ultimately in providing for the well-being of society, is civil law. Civil law, however, also is not an end unto itself. The purpose of civil law is to preserve or enhance public order, and the demands of public order must be serious enough to trump the claims of freedom in order to justify the making of civil law.

4. Public order, in turn, according to Fr. Murray, encompasses three goods: public peace, essential protection of human rights, and commonly accepted standards of moral behavior in society.²

5. There is a distinction between what constitutes public morality and what would be considered private morality. When speaking of public or private morality, we are talking about some objective "oughtness" that should guide personal and social choices. Examples of such "oughtness" are found, for example, in the assertion in the Declaration of Independence that there are certain truths that are self-evident and in the United Nations' Charter of Human Rights. Clearly, in a pluralistic society, it is not always easy to gain consensus on what constitutes such public morality.

Prohibition and civil rights are two examples of how, as a nation, we have struggled to identify what constitutes public morality.

6. Even if there is agreement on the boundaries of public morality, civil law is not always an appropriate instrument in the preservation or enhancement of public morality. First of all, civil law primarily addresses external acts

and values that are formally social, as distinguished from interior choices and motivation. Second, as noted above, the demand of public order must be serious enough to justify limiting personal freedom.

7. The Roman Catholic ethical tradition, while acknowledging the distinction between public and private morality, believes that the origin of much of morality is located in what we call the natural law. In simple terms, this means we believe there is a purposefulness or rightness about what it means to be a human person that can be articulated, using the resource of human reason. This purposefulness or rightness is not something given to the human person by social convention, but, rather, because it is part of the very being of our personhood, is a reality that should guide and inform individual and collective

moral analysis. Although, as believers, we approach such reasoning from our religious foundation, we believe that the methodology of our reasoning, and its mode of discourse, can be shared with those who do not affirm our faith tradition. It is this mode of analysis that we bring to public discourse about what constitutes public morality and about which aspects of public morality should be protected by civil law.

8. Over the course of our life as a nation, we have come to identify three sectors or zones within society: the private sector, the voluntary sector, and the public sector. The private sector is the arena of personal or private activity. The voluntary sector is one in which individuals come together to nurture or support private or personal goods, as well as the social goods that advance our collective well-being. The public sector involves the activities of government, ranging from the local level to the federal in its many dimensions.



9. From our earliest years as a nation, we have relied on the voluntary efforts of individuals and organizations to advance causes that benefit the well-being of society. This reliance was a result of a somewhat restrictive understanding of the role of the state, noted earlier, and a recognition that at times more than individual activity is required if the common good is to be advanced. It is in this sphere that the social and health care services provided by religious and other organizations are located. In most instances, these activities were not a vehicle for proselytism but rather for faith-motivated social service. As our colleagues in Catholic education say when speaking of their presence in the inner city, where few Catholics live: "We do not educate children because they are Catholic, we educate children because we are Catholic." In keeping with this religious motivation and in recognition of the value of these services to the common good, the state has accorded religious providers the leeway to carry on their public service in a manner consistent with their values and beliefs.

10. According to the framework outlined so far, religion has a place in all three spheres or sectors of society. In the private sector, it provides individuals a source of meaning and purposefulness that both nurtures their personal lives and provides a moral compass by which they live as a citizen. In the voluntary sector, religiously motivated and sponsored activities can advance the common good by providing needed social services that do not require the presence of government. In the public sphere, the moral vision associated with a faith tradition can contribute to the development of a consensus about the parameters of public morality and the role of civil law in supporting the public moral order.

11. Over the centuries, there has been significant movement in our society's understanding of the boundary between public and private morality. In some instances, the sphere of private morality has been expanded. For example, a civil law prohibiting the use of contraceptives was overturned by the U.S. Supreme Court on the assumption that a married couple's decision to use or not use contraceptives was a matter relating to private morality and not an apt subject for civil law making. On the other hand, many aspects of racial discrimination—in housing, education, and voting—were found to be so detrimental to public order that they were no longer understood as purely a matter of private morality. Rather, such discrimination was determined to be so detrimental to the public order that the state intervened by

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enacting laws that established new boundaries for social activity.

12. Although many anti-discrimination laws were enacted to protect civil rights, their passage did not necessarily signify a universal public consensus that all these issues involved matters of law and public policy. As Cardinal Bernardin noted, "Law and public policy can also be instruments of shaping a public consensus; they are not simply the product of consensus."³ That being said, there are limits to what law can do. As Martin Luther King, Jr., used to say: Law cannot make people love their neighbors, but it can stop their lynching them. In other words, law cannot legislate the morality that flows from the human heart; it can, however, moderate human action.

13. The complexity involved in arriving at public consensus sufficient to inform civil law is obvious when it comes to the use of alcohol. From the perspective of history, Prohibition was a failed attempt to legislate personal behavior. Although some in society had a deeply held belief that alcohol should not be consumed, they were unable to turn that belief into a law that Americans would obey. As Cardinal Bernardin once noted, "A rationally persuasive case has to be made that an action violates the rights of another or that the consequences of actions in a given issue are so important to society that the authority of the State and the civil law ought to be invoked to govern personal and group behavior."⁴ He went on to note that we arrive at such conclusions "by a process of debate, decision making, then review of our decisions." In this instance, the argument for Prohibition did not survive the test of time and experience.

14. Currently our society is engaged in several such debates. On the matter of the rights of an unborn child vis-à-vis the rights of a mother, our nation is deeply divided. It seems possible that a similar debate will ensue over the nature of marriage in civil law.

15. That such debates happen over the course of time is not surprising when one considers the complex matrix we have been describing. What makes the current situation somewhat unique is that the debate is not just about a particular subject—that is, abortion or, by extension, so-called reproductive rights—but about the role of a religiously motivated perspective in the forming of public consensus and the role of religiously motivated social services in the public square.

I would suggest that religion currently has multiple roles in our society. Among them are the following:

- Religion is provided the space to be a source

of personal meaning or spirituality that is expressed in individual and social activity.

- Space also is provided for individuals and faith communities to celebrate their faith in worship services and to actively proclaim that faith to others.

- Organized religion is allowed to express its vision of a good society by providing religiously motivated social goods that advance the common-weal.

- In utilizing public discourse, persons of faith and communities of faith can help shape society's understanding of the boundaries of public morality and its understanding of what is an apt subject for the making of civil law.

The nature of the "space" for religion in each of these arenas is not unlimited and has changed over time. For example, civil law prohibits polygamy even if polygamy reflects a deeply held religious belief; the location of houses of worship can be regulated; religiously motivated education that advances racial bigotry will not enjoy the benefit of tax exemption; a religiously motivated call to arms against the state is prohibited.

ANALYSIS

It is in the context of these 15 premises that we can analyze our current situation. I would suggest that when we look at the abortion debate (as well as the assisted-suicide debate), the real question is whether there are any dimensions of our public morality as a civil society that neither civil law nor judicial decree can reverse. To say it differently: Is an essential ingredient of the fabric of our society, the conviction that there are some guiding values that transcend time and political convention? For example, are "crimes against humanity" crimes because the victor so legislates, or because, whatever the form of government happens to be, some actions are always wrong (e.g., genocide)? If one says that the second answer is the correct one, clearly there is need for much more discussion. What are such values and what is their significance when they encounter other such values in a conflictual situation? The answers to those questions are still to be determined. Similarly, the question whether such values are of such significance to the public order that they should be protected by civil law is also subject to discussion and debate.

In the matters of abortion and euthanasia, many people of faith (and many of no faith as well) have concluded that the value of innocent human life is one of those values, or principles, that is not a human construct but rather a truth transcending human experience. For such people, it is a constituent dimension of a society's public morality.

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Our opponents clearly have a different perspective. Although they would not deny a person's right to such a belief, they are in effect saying that it is a matter of private morality and, consequently, like the decision to drink or not drink alcohol, not an apt subject for public policy or civil law. From this perspective, an argument cast in the analytical mode of natural law by a person of religious faith becomes an example of an inappropriate attempt to make civil law correspond to a religious belief, rather than, as it is in our view, a religiously informed conviction concerning the nature of public morality, a conviction that, moreover, requires those who hold it to participate in public dialogue. Not surprisingly, our opponents find it convenient to propose that what is at stake is preserving the separation of church and state, rather than advancing a body of religiously informed values in the public discourse of a pluralistic society concerning what constitutes society's public morality. Consistent with such a view, many would argue that the voice of religion should be banned from such public discourse and be content to do its work in the arena of private morality.

Unfortunately, the shrillness and intensity of some of the debate has kept us from discussing the real issue: Do we, as a society, want to reverse centuries of our American experiment and say that not only must the state be secular but so, too, must society? How can we best respond to such a challenge?

From my perspective, it is critically important that we participate in the public discourse in a manner appropriate to dialogue in a pluralistic society—that is, trusting in the reasonability of our perspective and its congruence with human experience. One can, from a solid legal and philosophical perspective, propose the existence of foundational values without appealing to creedal beliefs. Our natural law tradition is a tradition of reasoned analysis reflecting the best of human experience.

Such a perspective does not banish religion from the public square. On the contrary, it is the moral vision of the community of faith that inspires such discourse, sustains it in difficult times, and, at times, provides the motivation and courage to engage in prophetic witness. Inspiration, reasoned discourse, and prophetic witness all are apt means of participation in the process of framing a public consensus about the nature of public morality. The Civil Rights revolution had Martin Luther King's evocative imagery and the powerful witness of the marches, but it also had the reasoned discourse of the political process that

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COMMUNICATION STRATEGIES

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might consider including a "senior button" on its home page, linking to its own health information, referrals, and senior activities, as well as to other reputable local and national websites.

Hospitals are also collaborating with local senior organizations to cosponsor programs and services and to strengthen partnerships. These organizations include area agencies on aging, senior centers, the AARP, and the National Council on the Aging, Foster Grandparent Program, Volunteer Centers, Interfaith Volunteers, Older Worker Programs, active retiree groups (i.e., teachers, government workers, nurses) and others. Veterans' organizations such as the Veterans of Foreign Wars, American Legion, local veterans services, and Councils for Veterans Affairs; religious groups such as local ministerial associations, Catholic Charities agencies, the St. Vincent de Paul Society, Jewish Family Services, and Christian Outreach; and programs catering to ethnic and language groups—all are proving to be excellent partners for health-related organizations. □

To learn more about CHA services concerning senior citizens, contact Julie Trocchio, senior director, continuing care ministry, at jtrocchio@chausa.org or 202-721-6320. For information on communication strategies and seniors, contact Rhoda Weiss at rweiss@memnet.org or 310-393-5183.

NOTES

1. Fred Bayles, "Gadgets Help Baby Boomer Navigate Old Age," *USA Today*, November 16, 2003, available at www.usatoday.com/news/nation/2003-11-16-gadgets-cover_.htm.
2. Roberta Rared, "Grown-Ups Need Their Flu Shots, Too," *AARP Bulletin*, February 2003, p. 21.

REFLECTIONS

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crafted the Civil Rights legislation. It would be unfortunate if our opponents' attempt to marginalize the voice of religion from the public square was unwittingly assisted by a failure on our part to participate in all aspects of consensus building and law making.

The above analysis makes note of the role of public witness in the discourse about the nature of public morality. As Roman Catholics, we know the power of the personal witness given by a Mother Teresa or a Dorothy Day. We also know the importance of institutional witness. When, as believers, we carry on individual and collective works of charity, we do so because this is the right thing to do (e.g., the preferential option for the poor), but also because in so doing we witness to a moral vision of right relationships within the human community. When we engage in such witness we are acting not just as persons or communities of faith but as social actors. In other words, when we provide human services, social goods, for the well-being of society through our efforts in the voluntary sector, we are also participating significantly in the framing of public discourse about public morality and public policy. In fact, the church's three institutionalized ministries, education, charities, and health care, have been quite visible and effective advocates for a better society and social order. Catholic health care's passion with regard to access for all is but one example.

In light of this history and potential, one can only wonder if the effort to force us to provide services inimical to our beliefs might not have several motivations. In addition to pursuing an agenda of unlimited access to abortion and so-called "reproductive services," are our opponents also seeking to silence a powerful voice in public discourse? Do they know, in seeking to require us to provide what would violate our conscience, that we will never abandon our faith and that, confronted with such a dilemma, we would have no choice but to withdraw from public service? Is their ultimate goal to silence the powerful witness and reasoned dis-

course we bring to the public square? In a nation that remains divided about what should constitute its public morality, do they seek ultimate victory by removing their strongest protagonist—religious communities and their institutional works—from the public square?

Lest this sound hysterically paranoid, consider recent legislation in California, on which that state's supreme court could well rule before this column is published. The fact that it would place some constraints on religion, as noted earlier, is not unusual. What is unusual is that the legislature has decided that it can say to a religion that religiously motivated provision of social goods and services is not entitled to the same conscience protection as those activities that the legislature views as truly sectarian. Does not this legislation, in effect, imply that in the American society the most appropriate role of religion is in the sphere of private morality and, consequently, that it should not be accorded its traditional presumptive protections in the voluntary and public sectors?

These reflections began with a hypothesis and outlined some premises that provide the context for these reflections. Obviously, the credibility of the hypothesis depends in part on the merits of the premises. And even if they are correct, the hypothesis might not be correct.

I would propose, however, that, at the least, we consider the possibility that there is more at stake than the particular services we are or are not required by the state to provide. When we speak of "freedom to serve," we also could be speaking about the freedom to institutionally witness to and mold our nation's vision of what constitutes a good, if not great, society. □

NOTES

1. Joseph Bernardin, *Consistent Ethic of Life*, Thomas G. Fuechtman, ed., Sheed & Ward, Kansas City, MO, 1988, p. 91.
2. Fr. Murray's words are paraphrased in Bernardin, p. 92.
3. Bernardin, p. 93.
4. Bernardin, p. 92.